

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DALE McKINNEY</b>	)	
Claimant	)	
VS.	)	
	)	
<b>WE-MAC MANUFACTURING CO., INC.</b>	)	Docket No. 250,697
Respondent	)	
AND	)	
	)	
<b>FIREMANS FUND INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed the preliminary hearing Order dated July 6, 2000, entered by Administrative Law Judge Jon L. Frobish.

**ISSUES**

Claimant alleges he contracted "metal fume fever" while working as a welder for respondent. Judge Frobish denied claimant's request for preliminary hearing benefits based upon a failure of proof that claimant suffered an accidental injury or occupational disease arising out of and in the course of employment. Whether claimant sustained personal injury by accident or occupational disease arising out of and in the course of employment with respondent is the only issue on this appeal.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**Findings of Fact**

After reviewing the record compiled to date, the Appeals Board finds the ALJ's Order should be affirmed.

(1) The claimant, Dale McKinney, alleges he injured his lungs while working as a welder for We-Mac Manufacturing Company from June 1998 through June 23, 1999. He complains of shortness of breath and a lack of stamina. "I just can't do the stuff for long periods, durations, over time that I used to be able to do."<sup>1</sup>

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<sup>1</sup> Transcript of 2/9/2000 Prel. H. at 7.

(2) In December of 1999 claimant sent respondent a letter putting respondent on notice of his claim and requesting medical treatment for symptoms of "metal fume fever" that he had been experiencing for over a year.

(3) Mr. McKinney was sent by his attorney to Linda Frazier, M.D., who examined claimant on January 5, 2000.

(4) Dr. Frazier's report indicated Mr. McKinney had a history "consistent with a chronic respiratory disorder, which had its onset in 1997 after performing welding inside an enclosed space without ventilation." Dr. Frazier opined that claimant's "flu-like symptoms may have been episodes of metal fume fever." (Emphasis added.) But she recommended additional testing and a review of additional medical records "to assist in characterizing the [claimant's] respiratory disorder."

(5) Dr. S. Hagan with Via Cristi/St. Francis in Wichita, Kansas, issued a Pulmonary Function Report Interpretation on January 21, 2000. In a letter dated April 28, 2000, Dr. Hagan was asked by respondent's counsel whether "at this time, based on the results you noted, do you believe, within a reasonable degree of medical probability, that Mr. McKinney can be diagnosed with metal fume fever?" He answered "No, this test would not indicate this disease."

(6) The February 23, 2000 letter report of claimant's family physician, Bobby J. Ellis, M.D., reads: "I am writing in regard to Dale McKinney. I am uncertain whether or not he has lung problems, and I am uncertain whether they would have been caused by welding fumes in the course of his employment. I recommended he see a pulmonologist for a more definite opinion."

(7) Dr. Frazier issued a second report on February 18, 2000, wherein she again could not attribute claimant's symptoms to his work within a reasonable degree of medical probability. "In my opinion, his history was consistent with a chronic respiratory disorder with a dry cough and exacerbation in cold weather suggesting reactive airways. It is well known that welding can cause chronic respiratory disorders such as asthma and bronchitis. The flu-like symptoms he had experienced may have been episodes of metal fume fever."

(8) The Appeals Board finds that the evidence fails to establish that Mr. McKinney's present need for medical treatment is directly related to his employment with respondent.

#### Conclusions of Law

(1) The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that

right depends.<sup>2</sup> "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>3</sup> The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.<sup>4</sup>

(2) To receive workers compensation benefits, the claimant must show a "personal injury by accident arising out of and in the course of employment."<sup>5</sup> The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.<sup>6</sup>

(3) In Kindel v. Ferco Rental, Inc., 258 Kan. 272, 278, 899 P.2d 1058 (1995), the Supreme Court stated the general principles for determining whether a worker's injury arose out of and in the course of employment:

The two phrases arising "out of" and "in the course of" employment, as used in our Workers Compensation Act, K.S.A. 44-501 *et seq.*, have separate and distinct meanings; they are conjunctive, and each condition must exist before compensation is allowable. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. **An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.** Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service. (Emphasis added.)

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<sup>2</sup> K.S.A. 1999 Supp. 44-501(a); see also Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

<sup>3</sup> K.S.A. 1999 Supp. 44-508(g). See also In re Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>4</sup> K.S.A. 1999 Supp. 44-501(g).

<sup>5</sup> K.S.A. 1999 Supp. 44-501(a); Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984).

<sup>6</sup> Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 805, 909 P.2d 657 (1995).

(4) Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to each case.<sup>7</sup>

(5) The phrase "arising out of" employment requires some causal connection between the injury and the employment.<sup>8</sup>

(6) An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.<sup>9</sup> The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.<sup>10</sup>

(7) Considering both Mr. McKinney's testimony and the medical records in evidence, the Appeals Board agrees with and affirms the ALJ's finding that Mr. McKinney has failed to prove he sustained personal injury by accident or occupational disease arising out of and in the course of his employment with respondent.

(8) As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.<sup>11</sup>

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish, dated July 6, 2000, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 2000.

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BOARD MEMBER

c: Joseph Seiwert, Wichita, KS  
David S. Brake, Chanute, KS  
Jon L. Frobish, Administrative Law Judge

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<sup>7</sup> Newman v. Bennett, 212 Kan. 562, 568, 512 P.2d 497 (1973).

<sup>8</sup> Pinkston v. Rice Motor Co., 180 Kan. 295, 302, 303 P. 2d 197 (1956).

<sup>9</sup> Odell v. Unified School District, 206 Kan. 752, 481 P.2d 974 (1971).

<sup>10</sup> Woodward v. Beech Aircraft Corp., 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

<sup>11</sup> K.S.A. 1999 Supp. 44-534a(a)(2).

**DALE McKINNEY**

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**DOCKET NO. 250,697**

Philip S. Harness, Director